

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Joseph B. Cunningham,

Petitioner,

vs.

Independent School District No. 829,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATIONS**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 9:30 a.m. on October 29, 1998, at the Waseca County Courthouse, 307 North State Street, Waseca, Minnesota.

The Petitioner, Joseph B. Cunningham, 513 West Elm Avenue, Waseca, Minnesota 56093, appeared on his own behalf. Thomas K. Hagen, Patton, Hoversten & Berg, P.A., 215 Elm Avenue East, Waseca, Minnesota 56093-0249, appeared on behalf of the Respondent, Independent School District No. 829 (hereinafter "ISD 829" or "the District"). The record of the proceeding closed on November 6, 1998, upon receipt of the District's post-hearing brief.

NOTICE

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 (1996), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service

Building, St. Paul, Minnesota 55155-2079, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

1. Whether Mr. Cunningham was laid off from his position with ISD 829 as part of a good faith reorganization or whether the lay off resulted from a bad faith motive directed at him individually and designed to oust him from his position, entitling him to a hearing under the Veterans Preference Act.
2. Whether Mr. Cunningham was denied veterans preference points in the hiring process used by the District to fill a full-time custodial position.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Cunningham served in the United States Marine Corps on active duty from February 27, 1967, until December 13, 1967.¹ He received an honorable discharge from the Marine Corps.
2. On September 24, 1991, Mr. Cunningham began working for ISD 829 as a part-time custodian.² For the first two months, Mr. Cunningham worked on a full-time basis, substituting for an injured custodian. When that custodian returned to duty, Mr. Cunningham worked as a substitute, on an on-call basis.
3. The District is a political subdivision of the State of Minnesota, governed by an elected School Board that has the exclusive power to hire, fire, and lay off employees. The School Board is responsible for setting and approving the District's budget.
4. In March, 1993, Mr. Cunningham bid into a twenty-hour per week position, as well as working as a substitute. In October, 1995, Mr. Cunningham's hours were reduced to twelve hours per week and another substitute began working the other time that Mr. Cunningham had been working. Mr. Cunningham disputed the reduction of time and had the hours restored. No substitute hours were made available to Mr. Cunningham by the District since this dispute.
5. As a part-time custodian, Mr. Cunningham was responsible for vacuuming carpets, cleaning floors, cleaning bathrooms and other duties, as needed.

¹ Exhibit 4.

² Exhibit 5.

6. In the course of his employment with the District, Mr. Cunningham failed to appear at a conference with his supervisor scheduled for November 9, 1995, to discuss his employment status. He received a warning letter for failure to follow instructions and insubordination due to his nonattendance.³

7. On October 7, 1996, Daniel O'Neil was hired by ISD 829 as a substitute custodian at the Resource Center at the High School.⁴ Greg Milbrath, Director of Buildings and Grounds, found Mr. O'Neill to be punctual, enthusiastic, and capable to perform the duties required.

8. At the Waseca Middle School (grades 5-8) in 1995 and 1996, there were a head custodian, three full time custodians, and two part-time custodians (one of whom was Mr. Cunningham). In March, 1997, Mr. Cunningham became aware that a full-time position was opening with the District. He submitted a bid for that position. In Fall, 1997, the school changed to Waseca Intermediate School (grades 4-6) and housed other programs. The need for custodial staff changed at that time. Both part-time positions were transferred from the Middle School over the summer in 1997. Mr. Cunningham was transferred to Waseca High School where he continued in his part-time position working twenty hours per week.

9. Assistant Superintendent Virgil Christensen and Greg Milbrath were responsible for the custodian hiring process. They assessed all of the applications for the full-time custodian position that opened in Fall, 1997. Of all the applications received, Mr. Milbrath and Mr. Christensen took the four best candidates and asked them to interview for the position. When Mr. Cunningham's application was assessed, his skills, ability to perform the work required by the new position, and history of job performance were considered. Mr. Cunningham's veteran's status was considered by Mr. Milbrath. In Mr. Milbrath's opinion, Mr. Cunningham was not qualified to perform the additional duties that would accompany the full-time position.

10. The applicants interviewed are assessed on the basis of an interview form. The interview form contains thirteen job skills with a range of scores for each from one to ten.⁵ The maximum number of points that could be obtained is 130. For each candidate known to be a veteran, the "Veteran Preference" job skill was scored at 10.⁶

11. On July 28, 1997, Mr. O'Neil was hired as the full time custodian at the Intermediate School.⁷ On August 18, 1997, Mr. Cunningham was advised that Mr. O'Neill had been selected for the full-time position.

12. Mr. Cunningham was informed that his mother was suffering from cancer and would require significant treatment. In assisting his mother in obtaining treatment, Mr. Cunningham missed significant work time. On one occasion, Mr. Cunningham left work

³ Exhibit 6.

⁴ Exhibit 8.

⁵ Exhibit 1.

⁶ *Id.*

⁷ Exhibit 8.

early to get his mother to the hospital. The principal criticized his conduct in missing time on that and other occasions. They reached agreement over Mr. Cunningham's need to care for his mother, but the situation caused great strain between Mr. Cunningham and his supervisor and the principal.

13. In December, 1997, Mr. Cunningham was called for jury duty. Due to the uncertainty over whether he would be able to work on the day he was scheduled, there was confusion about having his shift covered.

14. In January, 1998, Mr. Cunningham's mother underwent surgery. Mr. Cunningham arranged with his supervisor to leave work to provide post-operative care. This care necessitated that Mr. Cunningham be away from work for significant time in the middle of his work shifts. This situation caused additional conflict between Mr. Cunningham and his supervisor.

15. On March 9, 1998, Principal Richard Hansen and David Schlaak, Head Custodian at Waseca High School, presented Mr. Cunningham with a performance evaluation. Of eleven factors assessed, Mr. Cunningham scored in the "Needs Improvement" level on seven of them and "Good" on the remaining four.⁸ The comments appended to the performance evaluation listed a number of problems that had arisen regarding scheduling and inadequate performance of his position.⁹

16. On April 28, 1998, Superintendent Schmidt informed Mr. Cunningham that his position was being eliminated and his contract would not be renewed.

17. At the special meeting of the School Board held on April 30, 1998, a large number of actions were taken regarding the 1998-99 budget for the District.¹⁰ Eight teachers' contracts were not renewed. Extended contracts for twelve teachers, most for one or two weeks, were terminated. Coordination pay for two staffers was terminated. Employment contracts for two part-time custodians (one of whom was Mr. Cunningham) were discontinued. The staff development budget was reduced by \$100,000 and the supply budget was reduced by \$33,120. The only employment decision adding staff was the addition of a fifth grade teacher, the approval of a contract for a Special Olympics Swim Coach and a Non-public Health Nurse. The current Special Olympics Swim Coach resigned.¹¹

18. In addition to the personnel changes, the School Board increased participation fees for school athletics, ticket prices for attendance at athletic events, and photocopying fees. The total cost and revenue changes amounted to \$329,000. The District anticipated receiving additional money from the Legislature. The total changes made in costs and revenue anticipated receiving approximately \$150,000 from the Legislature and would finally result in a small positive balance in the District budget.

⁸ Exhibit 5.

⁹ Exhibit 5.

¹⁰ Exhibit 10.

¹¹ Exhibit 10, at 3.

19. Mr. Cunningham was advised of the School Board's action by letter, dated May 1, 1998.¹² His last day of work was the end of the school year, June 3, 1998. At that time he was earning \$8.25 per hour. In July, 1998, Mr. Cunningham began to receive unemployment compensation in the amount of \$142.00 every two weeks.

20. On July 20, 1998, Mr. Cunningham filed a Petition for Relief with the Department of Veterans Affairs. A Notice of Hearing was served on ISD 829 on August 27, 1998, setting this matter on for contested case hearing.

21. After the end of the 1997-98 school year, the School Board was able, based on State revenue received, to reinstate five of the eight teaching positions reduced, the additional teaching weeks that had been cut, and most of the summer teaching and coordination that had been reduced. Neither of the two part-time custodians were reinstated. The other part-time custodian, who is senior to Mr. Cunningham, does work for the District as a substitute custodian, but has no regular hours.

22. The full-time custodians at Waseca High School are performing the duties that had been performed by Mr. Cunningham.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Under Minn. Stat. § 14.50 and § 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised under the Veterans Preference Act, Minn. Stat. § 197.46 in this proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The District received timely and proper notice of the hearing herein.

4. Mr. Cunningham is an honorably discharged veteran within the meaning of Minn. Stat. § 197.447 and § 197.46 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act, Minn. Stat. §§ 197.46, *et seq.*

5. The District is a political subdivision of the state within the meaning of Minn. Stat. § 197.46, and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46, *et seq.*

6. The requirement of the Veterans Preference Act, Minn. Stat. §§ 197.46, that a veteran is entitled to a hearing on whether cause existed for his or her dismissal

¹² Exhibit 11.

or demotion does not apply when a public body eliminates a position in good faith for some legitimate purpose, such as when it is part of a good faith reorganization.¹³

7. Whether a veteran's position has been eliminated in good faith for a legitimate purpose is an affirmative defense for which a public employer of the veteran has the burden of proof.¹⁴

8. The decision of the School Board on April 30, 1998, to eliminate the position of part-time Custodian, resulting in Mr. Cunningham's layoff on June 4, 1998, was made in good faith for legitimate purposes.

9. The District has not denied to Mr. Cunningham pretermination rights provided to him by Minn. Stat. § 197.46.

10. The hiring process followed by the District violates the requirement under Minn. Stat. §§ 43A.11 and 197.455 that veterans be afforded five points and disabled veterans be afforded ten points in competitive hiring examinations.

11. Mr. Cunningham suffered no damages through the improper hiring process used by the District.

12. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

13. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge that the Petition of Joseph B. Cunningham be DISMISSED.

Dated this 7th day of December 1998.

¹³ ***State ex rel. Boyd v. Matson***, 155 Minn. 137, 193 N.W. 30 (Minn. 1923), ***Young v. City of Duluth***, 386 N.W.2d 732, 737 (Minn. 1986).

¹⁴ ***State ex rel. Caffrey v. Metropolitan Airport Commission***, 246 N.W.2d 637 (Minn. 1976); cf. ***Southern Minnesota Municipal Power Agency v. Schrader***, 394 N.W.2d 796, 802 (Minn. 1986).

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape Recorded (three tapes); No Transcript Prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1 (1996), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

There are two distinct employment decisions at issue in this matter. The first issue is whether the process used by ISD 829 to fill a full-time custodial position infringed on Mr. Cunningham's right to preference as a veteran. The second is whether the District violated any hearing right under the Veterans Preference Act when Mr. Cunningham was laid off from his part-time custodial position.

The District asserts that it has fulfilled its obligations under the Veterans Preference Act and relevant cases in its hiring process for custodians. The primary case in the area is **Hall v. City of Champlin**, 463 N.W.2d 502 (Minn. 1990). Under **Hall**, public employers must adjust their hiring to a 100-point system and add five points to the veteran's score (ten, if the veteran is disabled). The District maintains that it is not conducting "open, competitive examinations" for which such scoring is required.¹⁵ The District supports this assertion citing a "similar situation" from a case in 1934.¹⁶

There has been significant development of the law since 1934. In cases decided after **Hall**, the hiring process cannot exclude qualified veterans from the step where the full application of veterans preference points are made. In a remarkably similar situation to that of the veteran in this case an administrative law judge analyzed the law on the matter as follows:

The County maintains that it is only required to award veterans preference points when "open, competitive examinations" are given. The County asserts that the application process followed for the Lucan Position and Redwood Falls Position does not fit that mold. That issue was resolved in Hall v. City of Champlin, 463 N.W.2d 502, 504 (Minn. 1990), where the Minnesota Supreme Court said:

.... the Legislature did not, by its use of the words, "open competitive examination" intend to restrict application of veterans preference

¹⁵ District Final Argument, at 2.

¹⁶ District Final Argument, at 2 (citing **State v. Village of Bovey**, 254 N.W. 456 (Minn. 1934)).

The Supreme Court went on to require that all political subdivisions use a 100-point scale for hiring to ensure that compliance with the Veterans Preference Act can be determined.

The County did not use a 100-point preference scale in the hiring process for either the Lucan Position or the Redwood Falls Position and this violates the Veterans Preference Act. However, to fashion a remedy, Petitioner must have been harmed. For both positions actually filled, Petitioner was included amongst the finalists. In the hiring method approved by the Minnesota Supreme Court in Hall, applicants are ranked by score, with any preference points added, and the highest scoring candidates are interviewed (or otherwise assessed) to determine who will fill the open position. The preference is granted in the initial scoring, not in the final interview. Thus, if a veteran is included amongst the finalists granted interviews, there is no more preference to be granted. McAfee v. Department of Revenue, 514 N.W.2d 301, 305 (Minn. App. 1994). In this matter, Petitioner was interviewed for the Lucan Position and that interview was applied to the Redwood Falls Position. There is no injury to Petitioner and, therefore, no remedy.¹⁷

In this matter, the selection of applicants for interview occurred before the inclusion of veterans preference points. That method violates the Veterans Preference Act.¹⁸

Before damages can be awarded under the Veterans Preference Act, the veteran must show that the violation caused the veteran harm. In this matter, Mr. Cunningham was not afforded an interview. He was, however, already an employee of the District and his job history was already known by the interviewers. Mr. Milbrath's testimony was credible that he had considered Mr. Cunningham's application and concluded that Mr. Cunningham was not qualified for the requirements of the position. Since Mr. Milbrath had been overseeing Mr. Cunningham's work for some years at that time, that experience is the equivalent of an interview. Mr. Cunningham would not have been hired for the full-time custodial position even if he had received five points and even if he had been given an interview. Since he suffered no damage through the District's violation of the Veterans Preference Act, there are no damages to be awarded.

ISD 829 maintains that Mr. Cunningham's layoff was the result of a good faith reorganization of the District's operations due to budget constraints.

Minn. Stat. § 197.46 (1998) provides in pertinent part:

¹⁷ **Saxton v. Redwood County**, OAH Docket No. 3-3100-9580-2 (Recommendation issued July, 1995).

¹⁸ Even the method used to include points for interviewees does not comply with the Act's requirements. Granting ten points out of 130 total points for all veterans provides more than five points to veterans and less than ten points to disabled veterans.

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

The parties do not dispute that Mr. Cunningham is an honorably discharged veteran who is entitled to the protections of the Veterans Preference Act to the extent that they may be applicable. The District does not assert that Mr. Cunningham's layoff was performance-related. The only question that arises is whether his layoff resulted from a reorganization which involved a good faith elimination of his position for legitimate reasons or whether it resulted from a bad faith motive directed at him individually for the purpose of removing him from his position.

On its face Minn. Stat. § 197.46 appears to apply to any action by a public body to terminate the public employment of an honorably discharged veteran. But, beginning in 1923, the Minnesota Supreme Court has distinguished situations where public employers are eliminating positions in good faith for legitimate purposes:

The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. [Citations omitted.] The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act.¹⁹

An assertion by the public body that a veteran's position has been eliminated as the result of a good faith reorganization is an affirmative defense for which the public body

¹⁹*State ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30, 32 (Minn. 1923); see also, *Young v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986).

has the burden of proof.²⁰ Moreover, in determining whether a position has been eliminated in good faith, a reviewing tribunal is obliged to examine the substance of the action and not just the form.²¹ Whether the elimination of the position has been taken in good faith or whether the reasons given by the public body are merely a subterfuge to oust the veteran from his position is a question of fact to be determined by the trier of fact by a preponderance of the evidence.²²

The recommendation to lay off Mr. Cunningham from his position was made as part of a district-wide budget process that included personnel cuts of many teachers, reduced staff time, reduced supplies, and cuts of two part-time custodians. There is no evidence to suggest that the anticipated budget shortfalls did not exist. Even after additional State revenue was obtained, three teaching positions and other staffing cuts were not restored. The District has met its burden to demonstrate that its actions were taken in good faith. Mr. Cunningham has not shown the District's reasons to be pretextual.

Since Mr. Cunningham's lay off resulted from a good faith reorganization, the District did not violate the Veterans Preference Act by failing to provide him with notice and the opportunity for a hearing. Although the hiring process used by the District violates the requirement that points be awarded to candidates prior to the final assessment, Mr. Cunningham had already received the equivalent of the final assessment through his supervisor's experience with his work record. Mr. Cunningham suffered no damages from the improper hiring process. Therefore, the Administrative Law Judge recommends that the veteran's petition be DISMISSED.

S.M.M.

²⁰ See, e.g., *State ex rel. Caffrey v. Metropolitan Airport Commission*, 246 N.W.2d 637 (Minn. 1976); cf. *Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 802 (Minn. 1986).

²¹ *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).

²² *Caffrey*, *supra*, 246 N.W.2d at 641; *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 157, 223 Minn. 435, 438 (Minn. 1947).